

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

PHILLIP NGHIEM,

Plaintiff,

v.

DICK'S SPORTING GOODS, INC. and  
ZETA INTERACTIVE  
CORPORATION,

Defendants.

} Case No.: SACV 16-00097-CJC(DFMx)

} ORDER DENYING DEFENDANTS'  
MOTION TO COMPEL  
ARBITRATION

I. INTRODUCTION

Plaintiff Phillip Nghiem brings this action against Defendants Dick's Sporting Goods, Inc. ("DSG") and Zeta Interactive Corporation ("Zeta") for violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.* (See Dkt. 1

1 [“Compl.”].) Before the Court is DSG and Zeta’s motion to compel arbitration. For the  
 2 following reasons, the motion is DENIED.<sup>1</sup>

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## 4 II. BACKGROUND

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6 The Complaint alleges that DSG administers a marketing program centered on  
 7 what they call “mobile alerts”—text messages sent to subscribers. (Compl. ¶ 17.)  
 8 Consumers can sign up for mobile alerts on DSG’s website or by sending a text message  
 9 with the word “JOIN” to a number associated with DSG, called a “short code.” (*Id.*) On  
 10 May 4, 2015, Plaintiff enrolled in DSG’s mobile alert program by texting the word  
 11 “JOIN” to DSG’s short code. (*Id.* ¶ 21.) Thereafter, on December 6, 2015, Plaintiff  
 12 texted the word “Stop” to that same short code, indicating that he no longer wished to  
 13 receive mobile alerts from DSG. (*Id.* ¶ 22.) DSG sent Plaintiff a text message indicating  
 14 that he had unsubscribed and would no longer receive mobile alerts. (*Id.*)

15

16 Despite this assurance, the Complaint alleges, DSG continued to send Plaintiff text  
 17 messages, including on at least eight particular occasions between December 11, 2015  
 18 and January 22, 2016. (*Id.* ¶ 24.) Each of the eight messages was sent, Plaintiff says, by  
 19 an automatic telephone dialing system after Plaintiff revoked his consent, in violation of  
 20 the TCPA. (*Id.* ¶¶ 23–24.) The Complaint seeks statutory damages, treble damages,  
 21 attorney’s fees, and an order certifying a class. (*See id.* at 9.)

22

23 On June 13, 2016, Defendants moved to compel arbitration, arguing that Plaintiff  
 24 was on notice of the Terms of Use on DSG’s website, which contain an arbitration  
 25 agreement Defendants say cover the TCPA claims at issue. Plaintiff insists that he was

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27 <sup>1</sup> Having read and considered the papers presented by the parties, the Court finds this matter appropriate  
 28 for disposition without a hearing. *See Fed. R. Civ. P. 78; Local Rule 7-15.* Accordingly, the hearing set  
 for July 11, 2016 at 1:30 p.m. is hereby vacated and off calendar.

1 unaware of the arbitration agreement and had no reason to know of it. And even if he did  
2 agree to an arbitration agreement, Plaintiff says, the agreement did not cover TCPA  
3 claims, and the agreement cannot be enforced by third parties like Zeta.

### 5 **III. DISCUSSION**

7 The Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*, “requires federal  
8 district courts to stay judicial proceedings and compel arbitration of claims covered by a  
9 written and enforceable arbitration agreement.” *Nguyen v. Barnes & Noble, Inc.*, 763  
10 F.3d 1171, 1175 (9th Cir. 2014). The FAA reflects both a “liberal federal policy favoring  
11 arbitration” and the “fundamental principle that arbitration is a matter of contract.” *AT&T*  
12 *Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); see also *Circuit City Stores,*  
13 *Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002) (“The [FAA] not only placed arbitration  
14 agreements on equal footing with other contracts, but also established a federal policy in  
15 favor of arbitration.” (internal citation omitted)). The district court’s role on a motion to  
16 compel arbitration is simply to determine whether a valid arbitration agreement exists and  
17 whether that agreement encompasses the claims at issue. *Chiron Corp. v. Ortho*  
18 *Diagnostic Sys.*, 207 F.3d 1126, 1131 (9th Cir. 2000). “[A]ny doubts concerning the  
19 scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone*  
20 *Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–24 (1983).

21  
22 The arbitration agreement at issue here is contained within the Terms of Use that  
23 govern visitors to DSG’s website. The Terms of Use constitute what is known as a  
24 “browsewrap agreement.” As the Ninth Circuit has explained,

25  
26 Contracts formed on the Internet come primarily in two flavors: “clickwrap”  
27 (or “click-through”) agreements, in which website users are required to click  
28 on an “agree” box after being presented with a list of terms and conditions of  
use; and “browsewrap” agreements, where a website’s terms and conditions

1 of use are generally posted on the website via a hyperlink at the bottom of  
2 the screen.

3 *Nguyen*, 763 F.3d at 1175–76. Browsewrap agreements “do[] not require the user to  
4 manifest assent to the terms and conditions [of a website] expressly.” *Hines v.*  
5 *Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366–67 (E.D.N.Y. 2009). Instead, the  
6 agreements purport to bind users simply by their existence, no matter whether the user  
7 has actually viewed them. *See Be In, Inc. v. Google Inc.*, No. 12-CV-03373-LHK, 2013  
8 WL 5568706, at \*6 (N.D. Cal. Oct. 9, 2013) (“The defining feature of browsewrap  
9 agreements is that the user can continue to use the website or its services without visiting  
10 the page hosting the browsewrap agreement or even knowing that such a webpage  
11 exists.”).

12  
13 Because of this lack of assent on the part of consumers, courts enforce browsewrap  
14 agreements with “reluctance,” *Nguyen*, 763 F.3d at 1178, and will generally only do so  
15 when a consumer has “actual or constructive knowledge of a website’s terms and  
16 conditions,” *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 790 (N.D. Ill.  
17 2011). In this case, Defendants argue that Plaintiff *both* had actual knowledge of, and  
18 constructive knowledge of, DSG’s Terms of Use.

19  
20 **A. Actual Knowledge**

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22 Plaintiff avers in a declaration that he did not “investigate, ‘carefully’ or otherwise,  
23 DSG’s website, terms of use, privacy policy, arbitration agreement, or class action waiver  
24 prior to joining DSG’s mobile alerts program,” that he “did not read or know about  
25 DSG’s arbitration agreement,” and that he only learned of that agreement when his  
26 counsel told him about it during this litigation. (Dkt. 50-1 [“Nghiem Decl.”] ¶ 9.) He  
27 goes on to insist that he never “thought of” arbitration agreements when enrolling in  
28 DSG’s program and that DSG never presented any arbitration agreement to him. (*Id.*

¶ 10.) Defendants argue that this is false because Plaintiff is in fact a lawyer whose former firm routinely handles TCPA cases, including TCPA cases against DSG and its affiliates. (Dkt. 47-5 (“Baran Decl.”) ¶ 3 (describing five demand letters sent by Plaintiff’s former law firm to DSG and its subsidiary, Golf Galaxy, between March 10, 2015 and November 4, 2015).) As such, Defendants say, Plaintiff can be expected to have been familiar with DSG’s arbitration agreement and have been fully aware of it when he enrolled in the mobile alerts program. (See Dkt. 47 (“Mot.”) at 7 (“One can safely assume that Plaintiff and his direct supervising attorneys exhaustively reviewed DSG’s website [in connection with prior demand letters].”)). Defendants also provide evidence that Plaintiff enrolled in a number of text messaging programs in a short period of time—“fishing,” Defendants say, for a TCPA lawsuit. (See Dkt. 47-2 (“Meyer Decl.”).) For his part, Plaintiff declares that he “never worked on any matter, including any TCPA matter, involving DSG,” and that while at his former firm, he “did not litigate as an attorney the enforceability of an arbitration clause in [any type of] matter, TCPA or otherwise.” (Nghiem Decl. ¶ 15.)

These facts are insufficient to permit the Court to infer actual knowledge of the Terms of Use on Plaintiff’s part. To be sure, as an attorney who sometimes litigates TCPA claims, Plaintiff surely has a greater level of understanding of the significance and prevalence of arbitration agreements. And Plaintiff *did* sign up for a significant number of mobile alerts programs within a few months. Nonetheless, actual knowledge is not something to be “safely assumed,” as Defendants would have it, based on a plaintiff’s occupation. Instead, Defendants were required to put forth “evidence” that Plaintiff had “actual knowledge of the agreement” at issue. *Nguyen*, 763 F.3d at 1177; *see also Van Tassell*, 795 F. Supp. 2d at 790–791 (requiring a “showing of actual knowledge of the terms by the webpage user”). Defendants’ speculation regarding whether Nghiem

1 reviewed, at some point in the past, DSG’s website Terms of Use is insufficient to meet  
 2 this standard.<sup>2</sup>

#### 4           **B. Constructive Knowledge/Inquiry Notice**

6           The second situation in which a browsewrap agreement may bind a consumer is  
 7 when a website “puts a reasonably prudent user on inquiry notice of the terms of the  
 8 contract.” *Nguyen*, 763 F.3d at 1177. Whether a consumer is on such notice “depends on  
 9 the design and content of the website and the agreement’s webpage.” *Id.* The  
 10 “conspicuousness and placement” of a hyperlink to a website’s terms of use, any “other  
 11 notices given to users” of those terms, and the “website’s general design” should all be  
 12 consulted when determining whether a user is on inquiry notice of terms of use  
 13 containing an arbitration agreement. *Id.* When a hyperlink to a website’s terms is  
 14 “buried at the bottom of the page or tucked away in obscure corners of the website,”  
 15 users cannot be said to be on constructive notice. *Id.* By contrast, when a website  
 16 contains an “explicit textual notice that continued use will act as a manifestation of the  
 17 user’s intent to be bound” by terms and conditions, courts find users to have constructive  
 18 or inquiry notice of those terms. *Id.*

20           Materials provided to the Court indicate that the hyperlink to DSG’s Terms of Use  
 21 appears “in the website footer” of DSG’s home page, as well as its page containing  
 22 information about its mobile app. (Kelly Decl. ¶ 13.) The link appears in a grouping of  
 23 27 other hyperlinks, arranged in four columns, that cover topics as diverse as “Careers,”  
 24 “Gift Cards,” “Commercials & Films,” and “Find a Store.” (*Id.* Exh. A; *see also id.* Exh.  
 25 D.) “Terms of Use” is sandwiched between “Only at DICK’s” and “California

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27           <sup>2</sup> Nor does Nghiem’s occupation or litigation activity have any bearing on the question whether he was  
 28 subject to inquiry notice of the Terms of Use, since that analysis asks whether a *reasonably prudent*  
 person, not a person in a particular plaintiff’s position, is on inquiry notice of a website’s terms and  
 conditions. *Nguyen*, 763 F.3d at 1177; *see also infra*, II.B.

1 Disclosures,” near the bottom of the third column of links. (*Id.*) This placement is not  
 2 conspicuous enough, alone, to put consumers on inquiry notice of the Terms of Use.  
 3 Indeed, the hyperlink in *Nguyen*, which the Ninth Circuit held did *not* put users on  
 4 inquiry notice, was considerably more conspicuous. It was placed “in the bottom left-  
 5 hand corner of every page on the [defendant’s] website” and was in “close proximity to  
 6 the buttons a user must click on to complete an online purchase.” *Nguyen*, 763 F.3d at  
 7 1178. In some cases, the hyperlink appeared “directly below the relevant button a user  
 8 must click on to proceed in the checkout process,” and in others, the content of the  
 9 defendant’s website was so compact that a user could view the link without being  
 10 required to scroll to the bottom of the page. *Id.* Nonetheless, the Ninth Circuit concluded  
 11 that the “proximity or conspicuousness of [a] hyperlink alone is not enough to give rise to  
 12 constructive notice.” *Id.* Instead, it held that

13           where a website makes its terms of use available via a conspicuous  
 14 hyperlink on every page of the website but otherwise provides no notice to  
 15 users nor prompts them to take any affirmative action to demonstrate assent,  
 16 even close proximity of the hyperlink to relevant buttons users must click  
 17 on—without more—is insufficient to give rise to constructive notice.

18 *Id.* at 1178–79. Here, DSG does not point to any “notice to users” of the Terms of Use,  
 19 nor does it allege that users of DSG’s website were affirmatively required to accept the  
 20 Terms of Use before completing certain functions. Accordingly, *Nguyen* controls, and  
 21 DSG’s website did not put consumers on inquiry notice of its Terms of Use.<sup>3</sup>

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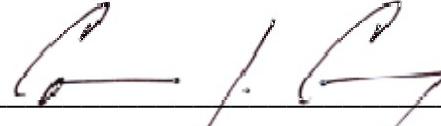
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 23  
 24           <sup>3</sup> Separately, Defendants argue that Plaintiff could not have learned of the keyword to join DSG’s  
 25 mobile alerts program without either clicking on “Text Alerts,” one of the 27 hyperlinks that  
 26 accompanied “Terms of Use” at the bottom of DSG’s web page, or clicking the “Mobile Alerts” link  
 27 which appears approximately two inches above the Terms of Use hyperlink. This may be so—in fact  
 28 the parties dispute whether the keyword was available elsewhere—but even assuming Defendants are  
 correct, this argument does not save their motion. As discussed *supra*, close proximity of a terms and  
 conditions hyperlink to buttons consumers are required to click does not, without more, put consumers  
 on inquiry notice of those terms. *Nguyen*, 763 F.3d at 1178–89.

1           As the Court has concluded that Plaintiff neither had actual knowledge of the  
2 Terms of Use, nor was on inquiry notice of those terms, he cannot be bound by the  
3 arbitration clause contained in DSG's browsewrap agreement. Defendants' motion to  
4 compel arbitration is therefore DENIED.

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6 **IV. CONCLUSION**

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8           For the foregoing reasons, Defendants' motion to compel arbitration is DENIED.  
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12           DATED: July 5, 2016

13             
14           CORMAC J. CARNEY  
15           UNITED STATES DISTRICT JUDGE  
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